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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X 21-CR-0007
UNITED STATES OF AMERICA,
 Plaintiff

 Vs. Buffalo, New York
JOHN STUART, January 25, 2023
 Defendant
- - - - - X

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
UNITED STATES DISTRICT JUDGE

U.S. ATTORNEY'S OFFICE
BY: DAVID J. RUDROFF, ESQ.
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1 THE COURT: Good afternoon.

2 MR. BAGLEY: Afternoon, Judge.

3 MR. RUDROFF: Afternoon.

4 THE COURT: Please be seated.

5 THE CLERK: We're on the record in criminal
6 proceeding 21-CR-0007, United States versus John
7 Stuart for oral argument. Present in the courtroom
8 are assistant U.S. Attorney David Rudroff, defendant
9 Mr. Stuart with Assistant Public Defender Jeffrey
10 Bagley. The Honorable Jeremiah J. McCarthy presiding.

11 THE COURT: Good afternoon, Mr. Stuart and
12 counsel.

13 MR. BAGLEY: Good afternoon, Judge.

14 MR. RUDROFF: Good afternoon, Your Honor.

15 THE COURT: All right. This is the
16 defendant's motion to compel. Um, let me ask
17 initially, Mr. Bagley, the Government says this motion
18 is untimely. What's your response to that?

19 MR. BAGLEY: Judge, I did address it in the
20 reply. It's two-fold. So number one, we were before
21 Judge Vilardo as the Court is aware. Um, I raised the
22 issue of having more issues before Judge Vilardo. We
23 referred it back to Your Honor. Um, the Government at
24 that point took no position on it. Um, my -- my
25 understanding of what --

1 THE COURT: Who was the A -- was that Laura
2 Higgins AUSA?

3 MR. BAGLEY: It was.

4 THE COURT: Okay.

5 MR. BAGLEY: Yes, Judge. Um, my reading of
6 what occurred at that status is that it was referred
7 -- you know, the Judge could have denied my request --

8 THE COURT: Right.

9 MR. BAGLEY: -- to send it down to more
10 motions. He didn't. So my reading of what occurred
11 there is that he permitted this motion to go forward,
12 number one.

13 THE COURT: And -- and she didn't oppose it
14 and then you asked for another extension. I think
15 initially he said file by June something and then you
16 --

17 MR. BAGLEY: Yeah. All I did was ask for an
18 extension of that.

19 THE COURT: He granted that and that wasn't
20 opposed either; right?

21 MR. BAGLEY: I don't --

22 THE COURT: Yeah.

23 MR. BAGLEY: I believe that's right.

24 THE COURT: Yeah. David, what -- I mean, I
25 looked at the docket and it's just minute entries, but

1 it does seem that he granted the extension. Whether
2 it should have been granted or not I guess is not for
3 me to decide. What's your position in that regard?

4 MR. RUDROFF: Yes, Your Honor. My
5 understanding, and again, I wasn't the AUSA at that
6 point, was that the Government took no position and so
7 we wouldn't be precluded from arguing timeliness here.
8 I think there would have to be -- in order to consider
9 untimely motion there would have to be a finding of
10 good cause which is obviously a reason for not
11 bringing it on time as well as prejudice from not
12 bringing it. So yeah. We didn't take a position, um,
13 and at this point we would contend that it's untimely,
14 that there's no good cause to consider it at this
15 point.

16 THE COURT: All right. Well, I have your
17 respected positions in that regard, so let's turn to
18 the merits.

19 MR. BAGLEY: Sure, Judge. So --

20 THE COURT: Oh. Before I forget, Mr.
21 Bagley, just a housekeeping matter. Um, you filed
22 some materials in redacted form and they're -- and I
23 think the unredacted materials should also be filed
24 under sealed so that we have a full record.

25 MR. BAGLEY: Understood, Judge.

1 THE COURT: So we have --

2 MR. BAGLEY: You have those though; correct?

3 The Court has those?

4 THE COURT: Yeah. We have those.

5 MR. BAGLEY: Okay.

6 THE COURT: Yeah.

7 MR. BAGLEY: Um, so it's a -- I mean, part
8 of -- I guess, to continue to address some of the
9 untimeliness I think it ties into --

10 THE COURT: Well, yeah. Well, go ahead. I
11 mean, I have your positions on that, but go ahead.

12 MR. BAGLEY: Yeah. It just ties in, Judge,
13 I think to the whole -- to the motion to compel
14 itself; right? Because the reason that we have a
15 motion to compel at this stage after motions had been
16 filed and after Judge had ruled on one piece of the
17 motions is because essentially, Judge, as I point out
18 in the reply what we knew about the case, and when I
19 say we I mean the defense and the court because the
20 court was obviously -- not this court but Judge Roemer
21 I believe was involved -- the magistrate issuing Judge
22 was involved early in the case, um, what we knew about
23 it at that point was just the tip of the ice burg, and
24 we have learning not through government disclosures
25 that I can maybe be held accountable for, that I

1 should have gone through these disclosures and made
2 all of my arguments, that I should have made at that
3 point.

4 What we learned we only learned through our
5 own independent investigation, and that was in part
6 luck, in part effort, in part diligence because, um,
7 if it weren't for the fact that we had uncovered that
8 there's this much larger piece to this investigation
9 we would have all gone blithely on not knowing that --
10 that there's this investigation that essentially dates
11 back to 2017 based on what the defense has been able
12 to uncover.

13 So um, we're continuing to learn as
14 disclosures trickle in, as investigation continues
15 more and more about what it is that eventually led to
16 the search warrant that eventually led to the search
17 of my client's residence, and we're now aware that --
18 and look, I'm going to make some statements in here
19 and these statements are based on investigation that
20 I've done. We've also been in touch with attorneys in
21 other cases that have similar issues that arise out of
22 the same websites or same servers that were seized,
23 and I want to make these statements, Judge, and
24 they're based on my investigation. So at any point,
25 and this is part of I think the issue, that at any

1 point that I'm wrong about that it's not because I'm
2 trying to mislead the Court, but I also think the
3 Government has an obligation to tell me that we're
4 wrong or tell the Court what is actually happening
5 because this is based on what we've uncovered. Right?

6 So what we've uncovered is that there was
7 likely a server in Brazil that was taken down somehow.
8 Part of my motion to compel is to ask how in fact it
9 was taken down. That server was taken down and the
10 users that logged on the -- well, let's backup. The
11 main prosecution was against the folks who hosted that
12 server, who hosted the websites associated with that
13 server. There's more than one child pornography type
14 website that was hosted by the server on the tor
15 network.

16 So the tor network as the Court is aware is
17 designed to anonymize its users. People who use the
18 tor network part of the reason they use it is because
19 it doesn't identify who those folks are. So somebody
20 somewhere took down a server that hosted a website
21 that had a user that we now -- that the Government
22 claims an IP address that was then associated with my
23 client. So there's several levels of investigation
24 that had to occur before we get to a place where we
25 get a tip from, as the search warrant identifies it, a

1 unidentified foreign law enforcement agency that's
2 then forwarded to the FBI that says this particular IP
3 address was used to access this particular website.

4 So before all that could have happened,
5 there was as I understand it years and years of
6 investigation that led to the taking down of the
7 server, the deanonymizing of the IP address and then
8 the tip that's then forwarded on to the FBI in
9 Washington who then forwards that tip on to the FBI in
10 Western New York who then applies for a search warrant
11 based on all that.

12 So all that stuff that leads up until that
13 tip even the fact of the country that passes the tip
14 on wasn't as far as I know disclosed to the issuing
15 magistrate judge. None of that stuff before clearly
16 was identified, disclosed to the issuing magistrate
17 Judge. So we all -- again, we learn all this stuff
18 through our own investigation and it's -- the issue,
19 Judge, is what it really boils down to is that there's
20 been no assurances made -- the assurance that the
21 court has is an assurance that the UK did nothing
22 wrong. Right? But there's all this stuff that
23 happened before the -- that the UK the federal -- the
24 foreign law enforcement country identified in the --
25 in the search warrant even got the tip. Right? So

1 there's all these issues that surfaced because all
2 this other stuff that we didn't know about now comes
3 to the surface.

4 Um, and so what this motion to compel asks
5 is for the Government to identify in the last few
6 pages of my reply these things that were done
7 essentially to lead to the tip that would lead to the
8 search warrant of my client's house. Um, things such
9 as what agencies were involved, when the U.S. got
10 involved, documentation and information related to the
11 UK's investigation and maybe most importantly what
12 technique was used to deanonymize these IP addresses
13 which tor is intended to keep hidden.

14 So we know that they were somehow
15 deanonymized and we know that the server was somehow
16 taken down. We know that folks got arrested and
17 prosecuted in various countries for hosting these
18 servers and for hosting -- for creating the servers
19 and for hosting these websites, but we don't know how
20 any of that was done and it raises -- it raises some
21 very serious concerns about whether those things were
22 done reliably, number one, and whether they were done
23 within the confines of the constitution because they
24 were done as far as we know in Brazil.

25 And there is a state actor here too. That's

1 the other important piece. The Portuguese authorities
2 after their investigation is done, and it's an exhibit
3 in my reply, issue essentially what amounts to a press
4 release and they lay out all these things that have
5 occurred throughout the years, one of which is -- or
6 more than one of which is the FBI helped us here, the
7 FBI helped us there, the FBI did this for us. So the
8 FBI is involved in this investigation the whole time,
9 but that's never told to the issuing magistrate judge,
10 and so we don't know if -- how those -- if those
11 techniques that were used if they comply with the
12 constitution and no assurance has been made.

13 The assurance that we have is that the UK
14 did nothing wrong, but that's just tip washing, Judge.
15 That's taking, you know, years of investigation,
16 laundering it through the UK and saying the UK says
17 it's all good, don't worry about it. That's not good
18 enough, Judge. They have to show their work.

19 THE COURT: Okay. Thank you. Mr. Rudroff?

20 MR. RUDROFF: Yes, Your Honor. Um, I guess
21 briefly just as a housekeeping matter, um, first and
22 foremost, the discovery motion is made pursuant to
23 Rule 16. Now, Rule 16 compels the production of
24 existing documents and things within the Government's
25 control. The defendant's demands are sort of phrased

1 as interrogatories essentially. Um, I'm not aware.
2 My research hasn't turned up any authority that would
3 allow the defendant to compel the Government to
4 essentially answer interrogatories or create
5 documents. So we read the motion as requesting
6 existing documents that would answer those questions
7 that were posed just so the Court understands, you
8 know, that position.

9 Um, now, we did turn over several documents
10 including cover documents from the FLA to the FBI.
11 The Court has those. I believe they were submitted in
12 unredacted form by the defense in their reply. Um, I
13 notice, just so we know what's not at issue, the last
14 line of the reply, the defendant's reply requests the
15 sealed complaint in US versus Kiter. I obtained that
16 this morning. I talked to Mr. Bagley. I believe it's
17 irrelevant to this case, but we're going to turn it
18 over pursuant to the protective order. Um, I don't
19 see any problem with that.

20 I also have a call scheduled with an
21 attorney in Washington who sort of spearheaded the
22 central aspect of this case. Um, I've represented to
23 Mr. Bagley that my intent is to turn over whatever has
24 been voluntarily disclosed in other cases by the
25 Government. Um, I can't guaranty once it comes in and

1 I review it that it may not be, you know, I'm at a
2 different view of work product or something like that
3 but my goal is to be open about what we're turning
4 over so there may be some further discovery.

5 The reason I think it's worthwhile to still
6 talk about the motion today is because I don't think
7 it's going to resolve the defense's motion. I don't
8 think whatever I turn over is going to answer all
9 those questions they posed.

10 THE COURT: Do you know when you're getting
11 that information?

12 MR. RUDROFF: I'm trying to schedule the
13 call with the attorney in the next couple of days.
14 Hopefully I can have whatever documents there are in
15 the next week or so.

16 THE COURT: Uh-huh.

17 MR. RUDROFF: Um, and again, I don't want to
18 represent on the record that I will turn over
19 everything, but it's my intent to review that and turn
20 over whatever's not privileged and potentially
21 discoverable.

22 THE COURT: Okay, but assuming that happens
23 and assuming you turn something over to Mr. Bagley,
24 that may narrow the scope of this motion; right?

25 MR. RUDROFF: It may, yes. And I imagine if

1 that's the case, then we can inform the Court of how
2 the party's positions may have changed based on that.

3 THE COURT: Okay.

4 MR. RUDROFF: I -- as of this morning I was
5 under the impression that I had turned over everything
6 and then I was asked to give time to double check and
7 that's sort of why this is, you know, late coming to
8 the Court so I do apologize for that.

9 Your Honor, I want to address one of the
10 justifications that the defense has raised for why
11 they need this extra discovery is the potential of a
12 Franks Hearing, that they think they can challenge TFO
13 Hockwater's affidavit, but the defendant is only
14 entitled to a Franks Hearing where there's evidence
15 that he's been deliberately misleading or acted in
16 reckless disregard for the truth. TFO Hockwater said
17 in his affidavit that the FLA informed him that no
18 U.S. computers had been searched, and I've turned over
19 to the defense the cover letter from the FLA that
20 states no computers had been searched.

21 THE COURT: Is that the September 16, 2019
22 letter?

23 MR. RUDROFF: Um, I'd have to -- one second,
24 Your Honor. I apologize.

25 THE COURT: The last -- it's -- I'll have

1 your --

2 MR. RUDROFF: That's correct, Your Honor.

3 Yes. The September 16, 2019 letter that's referenced
4 on Page 9 of our response.

5 THE COURT: Okay. Actually, I'm looking at
6 one that is attached to defendant's reply memorandum,
7 but I think it's the same letter.

8 MR. RUDROFF: I believe that's the same
9 letter, Your Honor.

10 THE COURT: Yeah.

11 MR. RUDROFF: Because we did disclose it to
12 the defense.

13 THE COURT: Okay.

14 MR. RUDROFF: So all that is to say, Your
15 Honor, that there's no -- nothing in this record
16 creates a question as to whether TFO Hockwater was
17 deliberately misleading or recklessly disregarding the
18 truth of what was in his affidavit. I can give some
19 background on the investigation that the defense
20 talked about. Um, based on my conversations with one
21 of the FBI agents who was in charge of disseminating
22 the leads around the country as they came from the
23 FLA.

24 The FBI was involved in identifying a server
25 in a third country that was hosting child pornography

1 sharing websites. They shared that essentially as a
2 lead with the country where it was being hosted. Now,
3 it was unclear whether that was sent directly to them
4 or if it went through a clearing house Europol to get
5 to them, but these channels of communication were
6 described to me as a series of one way streets. It's
7 not collaborative. The FBI doesn't go to them and say
8 here's the information and by the way, you know, we're
9 going to cooperate. We're going to apply for a
10 warrant. There's no cooperation. They say we located
11 the site. It's being hosted at this address. Here's
12 the info. Do what you want with it and then they step
13 back.

14 Now, at that point, the third country seizes
15 the site -- or excuse me, seizes the server, arrests
16 the person who is hosting it, does whatever they do as
17 far as deanonymizing users or simply collecting
18 anonymized users. Again, we don't know because the
19 FBI stepped back and they then send that into the same
20 lead system. In this case, it wound up with the FLA
21 and the FLA then took that information and sent it to
22 the U.S. with the assurance that the FLA did not um
23 search any U.S. based computers in the course of their
24 investigation.

25 So that's sort of how it happens behind the

1 scenes. It isn't collaborative. There isn't a back
2 and forth. It's simply a series of lead sharing
3 between countries. So in this case, again, the FBI
4 I've the server, sends that as a lead to the third
5 country. Third country does whatever it does. I as I
6 stand here do not know the investigative technique. I
7 don't know that the FBI knows the investigative
8 technique that was used because they stepped back.
9 What I was able to discern, what was represented to me
10 was it was not a NIT, network intrusion technique. I
11 hope I got that acronym right. This is not the
12 operation play pen that was referenced in the original
13 motion papers. That's, again, all that was told to me
14 but that information makes it to the FLA which is then
15 sent to the FBI. The FBI pushes the leads out.

16 Now, when they send the leads out they send
17 the FD1057 which was a form turned over to the
18 defense. I believe the Court has it as an exhibit.
19 They also send out as the defense has identified
20 essentially a draft affidavit that has a cover sheet
21 from an attorney at the child exploitation and
22 obscenity section. The draft affidavit is marked up
23 by that attorney. We have withheld those documents as
24 attorney work product. If the Court orders, we can
25 turn it over to the Court and for an in camera review

1 as to work product, but one thing that was told to me
2 is that when these leads go out, these draft
3 affidavits go out, there's an explicit instruction for
4 whoever the on the ground investigator is to reach
5 back out to the agents sending out the lead with any
6 questions. Make sure you are comfortable swearing
7 this out as true to the best of your knowledge and
8 belief before you do so and ask me any questions you
9 have.

10 Now, the agent who put out the leads did not
11 know off the top of her head if TFO Hockwater reached
12 out to her with questions about the affidavit, but she
13 did know that many agents around the country did. So
14 again, I think that goes to my original point which is
15 that there's nothing in the record that even opens a
16 possibility of a Franks Hearing. There's nothing that
17 suggests that TFO Hockwater deliberately
18 misrepresented anything or acted in reckless disregard
19 for the truth. He did take a draft affidavit. He
20 conformed it to this case. He had the opportunity to
21 the check the background information with an agent and
22 he swore it out, and he did so based on the
23 representation from the FLA that no computers in the
24 country were searched. So again, no Franks Hearing.

25 Other than that, Your Honor, um again, we

1 would rely on our papers as to the fact that there's
2 no materiality here. Again, this is -- in our view,
3 it's a fishing expedition. It's asking for
4 information based on press releases from other
5 countries, um, press releases from Interpol, perhaps
6 the inartful use of the word collaborative or whatever
7 words are used. It's a series of one way streets and
8 it's lead sharing. There's nothing in the record that
9 would raise a question as to whether the FBI acted
10 improvidently here. So aside from that, Your Honor,
11 we would rest on our papers.

12 THE COURT: All right. Thanks. Anything
13 briefly in reply?

14 MR. BAGLEY: Yeah. Judge, briefly. It's a
15 lot to process. I mean, we're still -- we're still as
16 I sat here today trying to take notes on what Mr.
17 Rudroff was saying I'm still learning new things about
18 the case as we sit here today and that's part of the
19 issue that we raise in the motion to compel, and part
20 of the issue is to why I think that the application to
21 the issuing magistrate judge was insufficient because,
22 you know, no fault of David Rudroff. He comes into
23 this case and he's trying to get this information. I
24 don't think he's stonewalling anybody right now, but
25 it's the United States Government that's trying to put

1 my client in jail.

2 These are questions and information that
3 should have been learned before a search warrant is
4 applied for. And so I'm in a difficult position now
5 to process what Mr. Rudroff has said and make
6 responsive arguments to that. It sounds like there's
7 still going to be potentially information that's still
8 going to be disclosed that may or may not affect the
9 motion at this point, Judge. So um, I guess --

10 THE COURT: Well, I guess what I was going
11 to suggest is that, um, you know, depending on the
12 timeframe for you, David, to get this additional
13 information, review it to see how much of it you want
14 to -- or intend to turn over to Jeff, some of which
15 may end up narrowing the issues. I think you said
16 you're pretty confident it won't resolve things
17 entirely, but it may narrow issues.

18 Maybe what we ought to do is either
19 reconvene in a couple weeks or give you the
20 opportunity to make supplemental submissions based on
21 either what you have discussed between yourselves
22 between now and then and/or whatever document --
23 additional documents you receive from David. If that
24 narrows some of the issues, then -- and this is aside
25 from timeliness. Um, but if that narrows the issues,

1 obviously I'd want to hear that. Um, so we could
2 either reconvene in a couple weeks or just give you a
3 deadline to make submissions of additional letter
4 briefs or whatever. What would the two of you prefer?

5 MR. RUDROFF: Um, without conferring with
6 Mr. Bagley, Your Honor, I think the legal questions
7 are still going to be the same. The only thing that
8 might come up is if what I disclose either checks
9 something off the list or I suppose potentially adds
10 something to the list. Um, so I guess if Mr. Bagley
11 and I can have an opportunity to convene, see how it
12 affects it and then maybe advise the court, and if we
13 feel that supplemental briefing is necessary, ask for
14 that at that point.

15 THE COURT: Sure.

16 MR. BAGLEY: That's essentially what I was
17 going to suggest, Judge. Yes. Maybe we set a date to
18 reconvene and if we think it's necessary maybe a date
19 to file papers as well if necessary.

20 THE COURT: Okay. So you want to reconvene
21 and submit; right?

22 MR. BAGLEY: All of the above. Is that an
23 option? C.

24 THE COURT: Yeah. No, that's fine but
25 because what I intend to do then is run my timeframe

1 for decision from that date whatever that is. So you
2 tell me when you want to -- what dates you're both
3 comfortable with.

4 MR. RUDROFF: Yeah, Your Honor. I can --
5 I'm making every effort to get whatever is going to be
6 sent to me by early next week. So maybe two weeks for
7 me to just -- it's not going to be terabytes. Two
8 weeks for me to get it look at it and give it to Jeff
9 and potentially convene.

10 MR. BAGLEY: Well, then maybe two weeks for
11 that point, Judge, for me to file something if
12 necessary and then a week after that come back in.
13 Does that make sense?

14 THE COURT: Okay. He said two weeks and you
15 want two weeks after that?

16 MR. BAGLEY: Two weeks from his deadline for
17 me.

18 THE COURT: Okay. All right. So today is
19 January 25. So by February 8, David, you will
20 transmit to Jeff any additional information that you
21 intend to transmit?

22 MR. RUDROFF: That's correct, Your Honor.
23 Yes.

24 THE COURT: Okay? And then by February
25 22nd, um Jeff, you can make a submission as to whether

1 this has narrowed any of the issues in dispute, and
2 then we'll come back in in -- or how about maybe
3 sometime on or about March 1?

4 THE CLERK: We could, Judge. Everything is
5 open except 2:00 on March 1.

6 THE COURT: Everything open except?

7 THE CLERK: Except 2, yes.

8 THE COURT: Okay. You guys can tell me when
9 you want to come in.

10 MR. BAGLEY: Yeah. Sometime in the morning,
11 Judge, if it's available.

12 MR. RUDROFF: I have a sentencing at 11, but
13 anything before that works for me.

14 THE COURT: Okay. How about March 1 at
15 10:00 or 9:30? You tell me.

16 MR. BAGLEY: 10's fine. Thank you.

17 MR. RUDROFF: 10:00, Your Honor.

18 THE COURT: 10:00, and then I'll run my time
19 30 days from that date; okay?

20 MR. BAGLEY: Thank you.

21 THE COURT: All right. Anything further
22 then today?

23 MR. BAGLEY: No, Judge.

24 THE COURT: Okay.

25 MR. RUDROFF: No, Your Honor. I think just

1 to confirm for record purposes that the speedy trial
2 clock under H1D --

3 THE COURT: Yeah, it's --

4 MR. RUDROFF: The speedy trial clock is
5 stopped under 3161H1D.

6 THE COURT: Well, yeah. The motion remains
7 pending. I've indicated that my 30 days will run from
8 March 1. So that's March 31; okay?

9 MR. RUDROFF: Yes, Your Honor.

10 THE COURT: Time is excluded until March --
11 or through March 31.

12 MR. RUDROFF: Yes, Your Honor. Thank you.

13 MR. BAGLEY: Yes, Judge. Thank you.

14 THE COURT: Okay. All right. Thank you,
15 guys.

16 (Proceeding concluded at 2:28 p.m.)

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1 CERTIFICATE OF COURT REPORTER

2

3 I certify that this is a true and accurate
4 record of proceedings in the United States District
5 Court for the Western District of New York before the
6 Honorable Jeremiah J. McCarthy on January 25, 2023.

7

8 S/ Brandi A. Wilkins

9 Brandi A. Wilkins

10 Official Court Reporter

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